



Internet Communications Utilities Regulation

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April 20, 2020

Molly Dwyer, Clerk of Court
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

RE: No. 20-70297, *Children's Health Defense, et al v. FCC, et al*, Response to FCC Notice of Supplemental Authority (Dkt 23)

Dear Clerk of Court Dwyer:

Children's Health Defense ("CHD") provides this brief reply to the FCC's 28(j) letter (Dkt 23).

The Commission continues to game the system. The FCC advises the Court of the D.C. Circuit's briefing schedule in its Case No. 20-1025, but conspicuously avoids mentioning several other important developments. First, the D.C. Circuit petitioners filed an amended petition for review on April 9. They did so for the same reason CHD filed its Supplemental Petition on April 2 (Dkt 21): the FCC finally accomplished Federal Register publication of the challenged order on April 1. Second, CHD separately served its Supplemental Petition on FCC and demanded that it provide notice to the multi-jurisdictional panel so a lottery can occur. (Attachment). The FCC acknowledged receipt (*Id.*), but it has failed and refused to comply with its mandatory and ministerial duty of "promptly" notifying the panel. 28 U.S.C. §2112(a)(3).

The FCC's notice asserts that the D.C. Circuit should assess the "validity" of CHD petitions. That is incorrect, as we noted in our Reply to the FCC's Response to our Counter-motion (Dkt 14) on pages 7-9. This Court must perform any such assessment, while the D.C. Circuit (if necessary) will do the same for the petitions originally filed in that court. *Gallup v. FERC*, 702 F.2d 1116, 1125 & n.1 (D.C. Cir. 1983) ("*Gallup I*"); *Gallup v. FERC*, 726 F.2d 772, 773, n 8 (D.C. Cir. 1984) ("*Gallup II*").

This Court cannot dispose the FCC's motion to transfer (or decide which of CHD's petitions is "ripe") without determining whether the "*NOI*" portion of the challenged order required Federal Register publication. To do that it must know the FCC's position on the issue. CHD Reply to FCC's Response to CHD Counter-motion (Dkt 14), pp. 10-11; CHD Counter-motion (Dkt 11), pp. 4-13. The FCC has steadfastly refused to clarify because doing so would likely reveal there was indeed no "race" and a lottery is required. The Court must grant CHD's counter-motion and require FCC to state its position on this fundamental issue.

Sincerely,

/s/ W. Scott McCollough

Counsel for Petitioners Children's Health Defense, *et al*

Service via Pacer

Subject: Re: No. 20-70297 Children's Health Defense, et al v. FCC, et al (9th Cir.)
From: Dwayne Hamblin <Dwayne.Hamblin@fcc.gov>
Date: 4/7/2020, 8:18 AM
To: "W. Scott McCollough" <wsmc@dotlaw.biz>

This is to acknowledge the Federal Communications Commission's receipt of the Supplemental Petition for Review in Children's Health Defense, et al. v. FCC, No. 20-70297 (9th Cir.).

From: W. Scott McCollough <wsmc@dotlaw.biz>
Sent: Thursday, April 2, 2020 6:27 PM
To: LitigationNotice <LitigationNotice@fcc.gov>
Subject: No. 20-70297 Children's Health Defense, et al v. FCC, et al (9th Cir.)

Attached please find the supplemental petition for review filed by Children's Health Defense, et al v. FCC, et al in the Court of Appeals for the Ninth Circuit on April 2, 2020, which is the day after notice of the action being challenged was published in the Federal Register. Children's Health Defense, et al, do wish to avail ourselves of the procedures established for selection of a court in the case of multiple petitions for review of the same Commission action. See 47 C.F.R. §1.13(a). If multiple petitions are filed we request and expect the Commission to follow the procedures established in section 28 U.S.C 2112(a).

Thank you.

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